U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9714493

Date: JULY 10, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a senior programmer analyst under the second-preference, immigrant classification for members of the professions holding advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the combined proffered wages of this and other petitions.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). If a petitioner employs less than 100 people, as in this case, evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage beginning in the year of a petition's priority date. If a petitioner did not pay a beneficiary at all or did not annually pay him or her the full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any difference between the proffered wage and the actual wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

Here, the accompanying labor certification states the proffered wage of the offered position of senior programmer analyst as $107,806 a year. The petition's priority date is July 12, 2018, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

At the time of the appeal's filing, evidence of the Petitioner's ability to pay the proffered wage in 2019 was not yet available. For purposes of this decision, we will therefore consider the company's ability to pay only in 2018, the year of the petition's priority date.[2]

The record indicates the Petitioner's employment of the Beneficiary in nonimmigrant work visa status since June 2016. A copy of an IRS Form W-2, Wage and Tax Statement, indicates the Petitioner's payment of $72,883 in wages to the Beneficiary in 2018. That amount does not equal or exceed the annual proffered wage of $107,806. Thus, based solely on wages paid, the record does not demonstrate the Petitioner's ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments to the Beneficiary. The company need only demonstrate its ability to pay the difference between the annual proffered wage and the wages paid, or $35,123.

A copy of the Petitioner's federal income tax return for 2018 reflects net income of $10,543[3] and net current assets of $15,725. Neither of these amounts equals or exceeds the $35,123 difference between

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[1] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

[2] In any future filings in this matter, the Petitioner must submit copies of an annual report, federal tax return, or audited financial statements for 2019.

[3] On its federal income tax return for 2018, the Petitioner chose to be treated as an S corporation. S corporations with income, credits, or deductions from outside their trades or businesses report such adjustments on Schedules K of their IRS Forms 1120S, U.S. Income Tax Returns for S Corporations. *See* U.S. Internal Revenue Serv. (IRS), "Instructions for Form 1120S," 21, https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited June 25, 2020) (describing Schedule K as a summary schedule of shareholders' shares of a corporation's income, deductions, and credits). The Petitioner reported additional deductions on Schedule K of its federal income tax return for 2018. We therefore cite the amount on line 18 of the Petitioner's Schedule K in an effort to more accurately reflect the company's annual net income.

the annual proffered wage and the wages the Petitioner paid the Beneficiary. Thus, based on examinations of wages paid by the Petitioner, its net income, and its net current assets, the record does not demonstrate the company's ability to pay the proffered wage.

On appeal, the Petitioner asserts that its 2018 net current assets totaled $123,337, more than the annual proffered wage of $107,806. The Petitioner, however, miscalculates its net current assets. The company appears to subtract what it calls its "total liabilities and capital" of $231,610 from its total assets of $354,947 to arrive at the figure of $123,337.[4] But net current assets represent current assets minus current liabilities. Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117-18 (3d ed. 2000). Schedule L of the Petitioner's federal income tax return for 2018 lists current assets of $33,146 and current liabilities of $17,421. The Petitioner's net current assets for 2018 therefore equaled $15,725, less than both the annual proffered wage, and the difference between the proffered wage and the wages the Petitioner paid the Beneficiary.

The Petitioner also contends that USCIS improperly disregards the company's bank account statements from September 2018 through November 2018, which, as of November 30, 2018, reflect an end-of-month balance of more than $40,000. Noting that the regulation at 8 C.F.R. § 204.5(g)(2) allows consideration of bank account records "[i]n appropriate cases," the Petitioner contends that the account balances represent funds available to pay the proffered wage in 2018. Our analysis of the Petitioner's net current assets, however, already considered the $33,146 in end-of-year cash listed on the company's federal income tax return for 2018. The Petitioner has not demonstrated that the cash listed on the tax return excludes the bank account funds and that the bank funds represent additional money available to pay the proffered wage in 2018. *See* section 291 of the Act (requiring a petitioner to demonstrate eligibility for a requested benefit).

The Petitioner similarly contends that USCIS errs in disregarding evidence of the company's $25,000 line of credit. A credit line, however, represents a bank's unenforceable commitment to loan money. John Downes & Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998). Because credit lines are not guaranteed, they do not establish petitioners' abilities to pay proffered wages. *See Rahman v. Chertoff*, 641 F.Supp.2d 349, 352 (D. Del. 2009) (affirming the AAO's determination that a line of credit did not establish a petitioner's ability to pay a proffered wage). We therefore reject the Petitioner's argument.

In addition, USCIS records indicate the Petitioner's filing of Form I-140 petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files from a petition's priority date onward. 8 C.F.R. § 204.5(g)(2). This Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this petition and any others that were pending or approved as of this petition's priority date or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries).[5]

[4] The Petitioner also appears to miscalculate its "total liabilities and capital." Schedule L of the company's 2018 federal income tax return reflects total liabilities of $355,535 ($17,421 in current liabilities, plus $125,513 in shareholder loans, plus $212,601 in mortgages, notes, and bonds payable in a year or more) and capital of $1,000.

[5] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that USCIS rejected,

In response to the Director's written request for additional evidence (RFE), the Petitioner provided information about six Form I-140 petitions it filed for other beneficiaries. USCIS records indicate the Petitioner's later withdrawal of one of the six petitions.[6] The Petitioner therefore need not demonstrate its ability to pay the proffered wage of the withdrawn petition.

Based on the information provided by the Petitioner, the combined proffered wages of this and the other five applicable petitions total $618,008. Copies of Forms W-2 show that the Petitioner paid applicable beneficiaries total wages that year of $316,973.65.[7] Subtracting the wages paid from the total proffered wages leaves $301,034.35 in combined proffered wages that the Petitioner must demonstrate its ability to pay in 2018. The company's federal income tax return for 2018, however, reflects insufficient amounts of net income ($10,543) and net current assets ($15,725) to cover that amount.[8]

As previously indicated and as the Petitioner argues, we may consider factors other than wages paid, net income, and net current assets in determining the Petitioner's ability to pay. Under *Sonegawa*, we may consider: how long the Petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other factors affecting the Petitioner's ability to pay the proffered wage. *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 2013. On the Form I-140, which was filed in November 2018, the Petitioner stated its employment of 16 people. But a copy of a federal payroll tax return for the third quarter of 2018, the most recent payroll tax return submitted, states the company's employment of only five workers. Although copies of the Petitioner's federal income tax returns show that its 2018 gross annual revenues exceed those of 2014 by more than 10 times, the returns also show that, from 2017 to 2018, the company's gross annual revenues decreased by more than 41%.

In addition, unlike the petitioner in *Sonegawa*, this Petitioner has not documented its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. The record also does not establish the Beneficiary's replacement of a current employee or outsourced service. Also unlike the petitioner in *Sonegawa*, this Petitioner must demonstrate its ability to pay the

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denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions or after corresponding beneficiaries obtained lawful permanent residence.

[6] USCIS records identify the withdrawn petition by the receipt number [redacted]

[7] The Petitioner submitted a 2018 Form W-2 for a beneficiary of a petition that was not among the six originally identified by the company. USCIS records, however, indicate the Agency's later denial of the additional petition. Thus, the Petitioner need not demonstrate its ability to pay the proffered wage of the additional petition. We therefore exclude the amount on the additional beneficiary's Form W-2 from the total wages paid.

[8] The Director's RFE instructed the Petitioner to provide information about Form I-140 petitions it filed in 2018. Besides informing the Director about the one other petition it filed in 2018, however, the Petitioner provided information about five other petitions it filed in 2017. Even if we considered only this petition and the other one the Petitioner filed in 2018 pursuant to the RFE's instructions, the record would not demonstrate the company's ability to pay the combined proffered wages. The proffered wages of the two petitions would total $215,612. Subtracting wages of $171,973.63 that the Petitioner paid to the two beneficiaries in 2018 would leave $43,638.37. Thus, the Petitioner would still lack enough net income ($10,543) or net current assets (15,725) to pay the combined proffered wages in 2018.

combined proffered wages of multiple petitions. A totality of circumstances under *Sonegawa* therefore does not demonstrate the Petitioner's ability to pay the proffered wage.

III. THE EXPERIENCE REQUIRED FOR THE OFFERED POSITION

Although unaddressed by the Director, the record also does not establish the Beneficiary's qualifying employment experience for the offered position. A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the primary requirements of the offered position of senior programmer analyst as a U.S. master's degree or a foreign equivalent degree, with no training or experience required. The labor certification also states the Petitioner's acceptance of an alternate combination of education and experience: a bachelor's degree and five years of "related IT [information technology] experience." The Petitioner requests the Beneficiary's classification as an advanced degree professional. Thus, the job-offer portion of the labor certification must require an advanced degree professional. *See* 8 C.F.R. § 204.5(k)(4)(i). The offered position therefore requires the Beneficiary's possession of at least five years of *post-baccalaureate* experience. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" to include "[a] United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty").

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained about five years and six months of full-time, post-baccalaureate, qualifying experience in India. A provisional certificate and consolidated marks statements document the Beneficiary's attainment of a bachelor's degree from an Indian university in October 2010.[9] The Beneficiary stated that Indian IT companies thereafter employed him from November 2010 through May 2016.

To support claimed qualifying experience, a petitioner must submit letters from a beneficiary's former employers. 8 C.F.R. § 204.5(g)(1). The letters must include the employers' names and addresses, and descriptions of a beneficiary's experience. *Id.*

The Petitioner submitted letters from the Beneficiary's claimed former employers. Contrary to 8 C.F.R. § 204.5(g)(1), however, the letter from the company that purportedly employed the Beneficiary from March 2013 to April 2014 does not describe the Beneficiary's experience. Without proper documentation of that claimed year of experience, the record establishes the Beneficiary's

[9] A petitioner may establish a beneficiary's attainment of a degree before his or her receipt of a corresponding diploma. *See Matter of O-A-, Inc.*, Adopted Decision 2017-03 (AAO Apr. 17, 2017). To do so, a petitioner must demonstrate that, at the time of a provisional certificate's issuance, a beneficiary "has completed all substantive requirements to earn the degree and the college or university has approved the degree." *Id.* at 4. Here, the Petitioner satisfied the *O-A-* requirements to demonstrate the Beneficiary's attainment of a bachelor's degree before his receipt of a diploma in April 2011.

possession of less than the requisite five years of post-baccalaureate experience. The record therefore does not establish the Beneficiary's possession of the minimum experience required for the offered position. In any future filings in this matter, the Petitioner must submit evidence pursuant to 8 C.F.R. § 204.5(g)(1) to demonstrate the Beneficiary's claimed employment from March 2013 through April 2014.

IV. THE PETITIONER'S INTENTION TO EMPLOY THE BENEFICIARY

Also unaddressed by the Director, the record does not establish the Petitioner's intention to employ the Beneficiary in the offered position. A business may file a Form I-140 petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis).

Here, the labor certification states the Petitioner's intention to permanently employ the Beneficiary in the full-time, offered position of senior programmer analyst from the company's headquarters in Texas. Online government records, however, indicate the Petitioner's forfeiture of its corporate status in its home state. *See* Tex. Comptroller of Pub. Accounts, "Taxable Entity Search," https://mycpa.cpa.state.tx.us/coa/ (last visited June 25, 2020). The Petitioner's forfeiture of its corporate status casts doubts on whether the company intends to continue business operations and permanently employ the Beneficiary in the offered position. In any future filings in this matter, the Petitioner must submit evidence of its continuing business activities and its intention to permanently employ the Beneficiary in the offered position.

V. CONCLUSION

The Petitioner has not demonstrated its continuing ability to pay the proffered wage of the offered position from the petition's priority date onward. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.